No. 10708

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

R. J. REYNOLDS TOBACCO COMPANY
and L. R. DONNELLY,

Appellants

vs.

GEORGE H. NEWBY, in his own behalf,
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,
both minors, by their Guardian ad litem, George H. Newby

Appellees

Reply Brief of Appellants

On Appeal from the District Court of the United States for the District of Idaho, Eastern Division

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A short reply brief is deemed advisable to point out wherein it is thought appellees have overlooked certain points of law and controlling evidence and failed to consider various fundamental errors heretofore assigned by appellants.

ARGUMENT

I.

Appellees were permitted to file an amended complaint wherein they attempted to allege two separate grounds for recovery against appellants, viz., (1) violation of the Idaho Guest Statute by Rulon D. Hair while in the allege scope of his employment, and (2) the retention of Hair by appellants

in their employ knowing him to be "a careless, reckless and incompetent driver of an automobile." The first ground is necessarily predicated upon respondeat superior, and the second on simple negligence.

Appellees now contend that simple negligence is not in the case, but that, they must depend upon a violation of the Idaho Guest Statute and proof that Hair was acting within the scope of his employment on company business at the time of the accident in order to recover against appellants. Their theory of attempting to prove what they contend to be prior acts of negligence on the part of Hair seems to rest upon their claim that appellants waived the necessity of appellees proving Hair's scope of employment because appellants employed what appellees contend was an incompetent driver of an automobile. On page 8 of their brief appellees state that this "case does not present any element of simple negligence as distinguished from reckless disregard or gross negligence." They overlook the fact that gross negligence is not an element of the Idaho Guest Statute.

It is the theory of the appellants that evidence touching prior acts of negligence on the part of Hair should not have been introduced in this case and in any event can only have a bearing on whether or not appellants were negligent in having Hair in their employ, and has no bearing whatever on the alleged violation of the Guest Statute and certainly cannot be considered as a waiver on the part of appellants to require that Hair at all times act within the scope of his employment.

Again, appellees seemingly contend that appellants are

attempting to distinguish "simple negligence" from any other type or degree of negligence. This is entirely erroneous. None of the authorities hold that entrusting an automobile to a known incompetent driver is other than ordinary or simple negligence. Every case cited by appellees on such point makes this clear. The only possible theory upon which any improper acts on the part of a driver of an automobile can be used or introduced to impose liability on the master for employing him is, when such acts are numerous enough to constitute a status of incompetency and are known to the master or have had such widespread publicity as to create a reputation generally known. Inferentially appellees recognize this fact in stating on Page 9 of their brief, "However, if the master knew he customarily acted as he did and that he acted within the scope of his authority, then the master is liable." This standard announced by appellees was certainly not reached in the instant case.

II.

The Myers accident was the only one which came to the knowledge of appellants. There is not a scintilla of evidence in the record to the contrary. As a matter of fact appellees only attempted to prove that incident and the B. R. Hair of Soda Springs incident in Dubois, Idaho, concerning which there was no knowledge on the part of appellants, and no reasonable grounds on the part of appellants for inferring such. Both of those incidents occurred three and one-half years before the present case arose. There is no proof that Hair "customarily acted as he did." There is no proof or attempted proof that he had a reputation for negligence or carelessness. There is, therefore, but one point to be faced, viz.: Does the

employer's knowledge of but one accident on the part of the driver, even though it was serious, render it negligence for an employer who may have known it, to employ such driver? Is one to conclude that a driver, who has had one accident, is forever barred from similar employment? The cases relied on by appellees answer these questions in the negative. Attention is particularly called to the case of Southern Pac. Co. vs. Hetzer, 135 Fed. 272, from which a quotation appears in appellees brief on page 28. Two paragraphs are quoted as if one followed the other. This tends to mislead. The fact is that between these two paragraphs appears the following:

> "A single specific act of ordinary negligence, however, has no tendency to prove incompetence, and imposes no such duty upon the master, because perfection is not an attribute of humanity, because ordinary care implies occasional forgetfulness, and hence the risk of the casual negligence of his fellow servant is that of the servant, and not that of the master." (citing authorities)

Furthermore, in that same case the Court analyzes the various cases on this point and on page 279 says:

> "This brief review of the opinions to which counsel for the plaintiff have referred us disclose the fact that, while there are two dicta, there is no adjudication among them in support of the position they have taken. And why should there be such a decision? The issue on trial in a case of this character is the negligence of the master, in that he failed to dismiss a servant who was employed with due care, and whom the law presumed to continue to be competent. Why should specific acts of negligence or the lack of skill of such a servant, of which the master has no know-

ledge or notice, and of which every servant subject to the infirmities of human nature must necessarily sometimes be guilty, be admitted in evidence to establish the negligence of the master in failing to discharge him? The employer is not liable for such acts. The fellow servant has assumed the risk of them. It is only when they have become so grave and numerous as to establish the habit and character, and so notorious as to establish the reputation of lack of care or of skill, that any liability for negligence in retaining the servant can attach to the master. The habit, the character, of a man or of a servant is not made, and it ought not to be provable by isolated, sporadic acts. It is the product of all the acts he performs during his life or his service. If the plaintiff may introduce in evidence two specific acts of alleged negligence of an engineer in stopping his train to prove his habit and character in this regard, and if he has stopped his train a thousand times within a reasonable period preceding the accident, may not the defendant also introduce in evidence the other 998 stops for the same purpose? And may not the parties litigate and submit to the jury the question whether each of these 1000 stops was careful or negligent? It by no means follows from the fact that a servant was guilty of negligence or a lack of skill on a few specified occasions that he is not ordinarily a careful and skillful workman, and the investigation of his specific acts to ascertain his character and habits would tend to confuse the case with collateral inquiries ,which, if carefully made, would indefinitely prolong the trial, and would lead the court and jury far away from the issue before them.

"This is not the only reason why such specific acts should not be received. A defendant is entitled to fair notice of the issues upon the trial of which his liability hinges. A complaint that a servant was incompetent, and that the defendant was negligent in that it did not discharge him, informs the master indeed that the habit, character, and reputation of the employe are in

> issue; but it is no adequate notice that the character of an isolated or specific act which the servant may have committed is to be tried, and that upon the character of that act the liability of the defendant is to hinge, and it gives the master no opportunity to prepare or to fairly try any such issue."

Several other cases to the same effect have been cited by appellants in their original brief.

On page 15 of appellees' brief it is said: "What difference can it possibly make that the statute has been amended by inserting 'reckless disregard' instead of 'gross negligence'? The contention is answered in Dawson et al v. Salt Lake Hardware Co., supra." Here again appellees are in error. "Reckless disregard" was not inserted in the statute instead of "gross negligence." The amendment deleted "gross negligence" and inserted in lieu thereof "intoxication." Nor was the contention raised by appellees considered in the Dawson case.

III.

Notwithstanding the fact that appellees contend the Dawson case holds wilful disregard includes negligence, still they argue that contributory negligence and assumed risk do not constitute defenses in a guest case. That argument appears on pages 29-31 of their brief. In making such argument, appellees completely disregard the cases of Dale vs. Jaeger, 44 Ida. 576, 258 Pac. 1081, Dillon vs. Brooks, 51 Ida. 510, 6 P2d 851, and French vs. Tibben, 53 Ida. 701, 27 P2d 475, all of which definitely sustains the proposition that a gratuituous guest may be guilty of contributory negligence preventing recovery, and likewise assumes the risk if the guest does not protest the driving of the host.

In support of appellees' theory that contributory negligence is not a defense, they cite a number of cases on page 30 of their brief. Three of those cases, viz., Miesmer vs. Dillon, 42 N. E. 2d 305, Regan vs. Keating, 42 N. E. 122, and Barnes vs. Collins, 32 N. E. 2d 626, seem to be erroneously cited; they do not appear in the book and page given. The remaining cases either recite statutes which do not contain the words "reckless disregard" (see the Ohio statute in Universal Pipe Co. vs. Bassett, 200 N. E. 843, and Haacke vs. Lease, 41 N. E. 2d 590) or construe the term "reckless disregard" as not negligence such as the Iowa cases or that the term means "wanton misconduct," as appears from the Connecticut case of Bordonaro vs. Senk, 147 Atl. 136. But it is to be remembered that appellants are charged with negligence, hence the plea of contributory negligence is available; also that the term "reckless disregard" was part of the Idaho statute when French vs. Tibben, 53 Ida. 701, 27 P 2d 475, was decided, and here as there the case was tried upon such theory and no complaint was made by appellees until their brief was filed.

In the case at bar Mrs. Newby was on a party with Hair for 18 hours (R.315-316). Hair testified to the fact that she had been drinking (R. 297, 321). Her doctor unwillingly admitted alcoholic odor on her breath when she was brought to the hospital (R. 165) and alcoholic content of her stomach (R.166). She never at any time protested the manner in which Hair was driving the car (R. 300-301). She was constantly with him, knew all that was done, and if his conduct was out of line, she knew all about it and acquiesced in it. Contributory negligence and assumption of risk was as clearly

proved as in the case of French vs. Tibben, 53 Ida. 701, Dillon vs. Brooks, 51 Ida. 510, and Dale vs. Jaeger, 44 Ida. 576.

IV.

On page 22 of their brief appellees argue that there was dispute in the evidence as to whether or not Hair was on company business. They say, "The appellees do not believe Mr. Hair's story that Mrs. Newby had been with him all night: Such a statement is absolutely unsupported by any evidence except of Hair." On the contrary, appellants contend that the presumption which arose, by Hair driving the company's truck, was completely overcome, without a scintilla of evidence to support the presumption. Hair testified that he met this woman at about 9:00 o'clock on the evening of September 10th, and they began their party and their visits to night clubs, which did not end 'till the accident at 4:30 P. M. the next day (R. 295-300; 315-316). Durwood Perkins testified that a woman who said her name was Avenell called Hair on the telephone between 7:00 and 9:00 o'clock in the evening; he answered the phone and she asked to talk to Hair and she said, "Just say Avenell is calling," and thereupon he called Hair to the telephone (R. 355-356). Hair testified that following this call he met her on the street and she went with him to his cabin, and about 9:30 or 10:00 o'clock they left for the Aero Club (R.315).

Appellants had alleged and maintained throughout the case that Mrs. Newby and Hair had been consorting for a number of hours, including the night of the 10th and day of the 11th of September, all of which could have been disproved by appellees if such had not been a fact. If Mrs. Newby had not been out all night her presence at home or elsewhere would

have been established. Her husband could not or would not testify where she was on the night of the 10th (R.177-181). Her brother, Russell Teuscher, admitted on cross-examination that he told Mr. Donnelly that he got the children and took them to his home but would not fix the date. At R. 240 he was asked and answered as follows:

"Q. Didn't you tell him you went and got the children because their mother wasn't home?

A. The date I didn't know.

Q. Did you tell him you got the children?

A. Yes, that I got the children.

Q. And that they were with you?

A. Yes, I did."

It certainly can't be contended that Hair's testimony is not conclusive when thusly corroborated and there is a total absence of proof to the contrary which could easily have been made if factual and true.

There is no dispute in the evidence touching the conduct of Hair and Mrs. Newby during those 18 hours. It has all been detailed in appellants' original brief, and it is submitted, such shows conclusively that Hair was off on a wild party, utterly forgetful of any duties to his employer, and devoting his attention wholly and completely to his own pleasure and that of Avenell Newby. To even argue under such circumstances that Hair was acting within the scope of his employment disregards the plain, undisputed, unimpeached testimony. The

presumption arising from Hair's use of the Company's truck was as completely overcome as it was in Magee vs. Hargrove Motor Co. 50 Ida. 442, and 296 Pac. 774. The fact that the truck had a Company sign on it does not affect this rule; White vs. Firestone Tire & Rubber Co., 90 Fed. 2d 637; and neither does the fact that some of the Company products were in the car at the time of the accident; Allen vs. Ross (Ark.) 138 S. W. 2d 409.

It is therefore appellants' contention that at the time this accident occurred, Hair was not, and had not been for 18 hours, acting within the scope of his employment and, that appellants were in no wise liable for his conduct during that period of time.

The one accident which came to appellants' knowledge three and one-half years earlier was insufficient to establish Hair's status as incompetent, or to render appellants negligent in retaining him in their employ and, that the one or two other minor derelictions on the part of Hair were not known and could not have been known by appellants. On either theory appellees' case must fall.

Furthermore, Hair had positive written instructions forbidding him hauling guests in this truck. These instructions were given and emphasized after the Myers accident, and Hair definitely promised to obey them. There is no evidence from which a jury could possibly conclude that those instructions had been waived. Appellees recite that Donnelly said to Hair in the presence of others: "Good God, did you have a woman with you again, I didn't know that." (R.237), which alleged statement Calvin Teuscher changed a bit (R.243). Donnelly

denied having made such statements (R.344). Assuming however he made them, the element of surprise and wrath evoked in Donnelly definitely disproves any charge of waiving those instructions.

Appellants believe that the cases all clearly hold that where an employee carrys passengers as guests contrary to instructions, such conduct places him outside the scope of employment so far as injury to the guest is concerned. See Albers vs. Shell Oil Co. (Cal.) 286 Pac. 572, Hartigan vs. Public Ledger (Penn.) 140 Atl. 524, Chajnacki vs. Dougherty (Mich.) 235 N. E. 789, and others cited on page 50 of appellants' brief.

V.

Appellants contend in their original brief that the Court erred in giving certain instructions to the jury, to which exceptions were taken, and in refusing to give nine requested instructions, all of which appear on pages 19-29 of their brief and are argued on pages 70-78 thereof. Appellees have given attention only to those requested instructions dealing with contributory negligence and asumption of risk, to which reference has heretofore been made. The error in refusing to instruct the jury, touching the testimony of Sid Close, and in giving to the jury an instruction covering in general the law of the road have not been answered by appellees. The mere fact that the Court had instructed the jury not to consider any of the evidence offered ,or stricken from the record, is not an answer to appellants' contention that the instruction touching Sid Close's testimony should have been given.

In answer to appellants' objection to giving the instructions as to the general duties of one driving a motor vehicle

on the highway, notwithstanding that this has nothing to do under the Guest Statute upon which appellees say they predicate their case, appellees argue that the jury was entitled to know the law of the road to determine whether or not Hair acted recklessly. This appellants contend is not an answer to appellants' objection. It left the jury with the idea that appellants might be held for any dereliction of Hair.

Appellants respectfully insist that errors touching instructions referred to by appellees, have not been satisfactorily answered and that a complete disregard of the remaining errors assigned is in effect an admission by appellees of the truth of such assignments of error.

It is therefore respectfully submitted that this case should be reversed as to appellants and that they recover their costs.

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